Complas Industries, Inc. *and* **Michael Allen Dunsworth.** Case 25-CA-11249

May 11, 1981

DECISION AND ORDER

On February 3, 1981, Administrative Law Judge Abraham Frank issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief in support of the Administrative Law Judge's Decision.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge, as modified herein.

The Administrative Law Judge dismissed the allegation that the questioning of employee Greg Doran violated Section 8(a)(1) of the Act, finding that it was isolated and noncoercive, and that the safeguards set forth in *Johnnie's Poultry Co. and John Bishop Poultry Co., Successor*,[3] are applicable only to questioning by attorneys. The General Counsel excepts, contending that the interrogation was coercive and that the standards of *Johnnie's Poultry* also apply to questioning of employees by management officials. We find merit in this exception.

Dunsworth named Doran in his charge as the person who he believed had informed management of his activities on behalf of the Union. Stuart concededly questioned Doran about the allegations in the charge, asking him about Dunsworth's work performance and union activity in the plant. According to Stuart, Doran "was evasive . . . . He pretended or stated that he didn't know anything about any Union." Stuart did not give Doran any assurances against reprisals or inform him that he was free to refuse to answer the questions.

Initially, we find that the questioning was neither isolated nor innocuous. Stuart concededly spoke to Doran on more than one occasion about the subject of the charge. When questioned, Doran was "evasive," and denied having knowledge of the union activity of which he was well aware. Under similar circumstances, the Board has found questioning by a high management official to be coercive. *O & H Rest., Inc., trading as the Backstage Restaurant*, 232 NLRB 1082, 1088 (1977).

Secondly, neither *Johnnie's Poultry*, itself, nor later cases have limited the requirements of that case strictly to attorneys.[4] Where management has legitimate needs to obtain information from employees it may do so if the stringent safeguards set forth in *Johnnie's Poultry* are observed. In this case, Respondent clearly ignored those requirements. Accordingly, we find that the questioning of Doran violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Complas Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By coercively interrogating employee Doran, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) of the Act, we shall order Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Complas Industries, Inc., Evansville, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their or other employees' union membership, affiliation, views, sympathies, activities, or other protected concerted activities in interference with, restraint, or coercion of their exercise of any right under the National Labor Relations Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] We are unable to agree with the Administrative Law Judge's finding that the size of the plant herein precludes application of the small-plant doctrine. Nevertheless we agree with his conclusion that, under all of the circumstances, the General Counsel has failed to establish by a preponderance of the evidence that Dunsworth was discharged for his union activity.

[3] 146 NLRB 770 (1964).

[4] See, e.g., *Roadway Express, Inc.*, 239 NLRB 653, 664-666 (1978).

(a) Post at its plant in Evansville, Indiana, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 25, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint herein be, and it hereby is, dismissed insofar as it alleges violations not found herein.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act, as amended, gives all employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT question you in violation of the Act concerning your union membership, affiliation, views, sympathies, activities, or other rights guaranteed you under the National Labor Relations Act, as amended.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COMPLAS INDUSTRIES, INC.

DECISION

STATEMENT OF THE CASE

ABRAHAM FRANK, Administrative Law Judge: The charge in this case was filed on August 23, 1979,[1] and the complaint, alleging a violation of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, was issued on October 18. The hearing was held on April 4, 1980, at Evansville, Indiana. All briefs filed have been considered.[2]

At issue in this case is whether Complas Industries, Inc., hereinafter Respondent, violated Section 8(a)(1) and (3) of the Act by discharging a single employee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY FINDINGS AND CONCLUSIONS

Respondent, with its principal office and place of business in Evansville, Indiana, is engaged in the business of manufacturing, selling, and distributing plastic molding compounds and related products. Respondent admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

Aluminum Workers International Union, AFL-CIO, Local Union 142, hereinafter the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE FACTS

Respondent's plant operates in three shifts: The first shift—7 a.m. to 3 p.m.; the second shift—3 p.m. to 11 p.m.; and the third shift 11 p.m. to 7 a.m. There are 4 employees in the mixing department and 11 employees in the production or extrusion department. At times material herein Jerry Duckworth and Rick Painter were foreman and leadman, respectively, on the first shift; Jack Spaulding and Jerry Campbell were foremen and leadman, respectively, on the second shift; and Russell or Mark McIntosh and Cliff Gary were foreman and leadman, respectively, on the third shift. James Stuart is the vice president of production and Jerry Clark is the plant superintendent.

Micheal Allen Dunsworth, the Charging Party, was employed by Respondent in July 1978, and assigned to the mixing department on the second shift. In September 1978 he was transferred to the third shift and in February, at his request, he was transferred to the production department under the supervision of Foreman McIntosh on the third shift.

On April 24 McIntosh evaluated Dunsworth's performance essentially as fair, but added the following comment:

[1] All dates are in 1979 unless otherwise indicated.

[2] Respondent's motion to correct transcript errors is granted.

> Does not know how to run a machine; does not try to find out what is causing the problem with the machine. Has a hard time in getting job done. Very sloppy in cleaning area. He causes so many problems for himself has no time to help anybody else.

McIntosh noted as a postscript, "Asking myself as foreman, he should have stayed in mixing or take a job as a bander." McIntosh called Dunsworth into the office and in the presence of leadman Gary told Dunsworth that the evaluation was not very good and that Dunsworth would have to improve. Clark also spoke to Dunsworth at this time.[3] Clark told Dunsworth that Dunsworth would have to improve or be terminated. Dunsworth left angry. About a week later Dunsworth asked to transfer to another shift. Thereafter, Dunsworth was transferred to the second shift under the supervision of Jack Spaulding.

On June 4 Spaulding evaluated Dunsworth's work essentially as fair with no adverse comments. In a conversation with Spaulding and Clark relating to the June 4 evaluation, Clark asked Dunsworth if there had been a personality conflict between Dunsworth and McIntosh. Dunsworth answered, "Yes." Spaulding told Dunsworth that he was doing a good job and Clark said that he had had no complaints from anyone other than McIntosh and for Dunsworth to keep working good.

About May or June complaints among the employees about forced vacations, forced overtime, and safety hazards prompted Dunsworth and another employee, Steve Eden, to contact a lawyer for the purpose of establishing a union at Respondent's plant. Thereafter, Dunsworth spoke to a few of the employees and it was concluded that this approach would be too expensive. Very late in June or early in July Dunsworth called Kenneth Palmer, an officer of the Union, and asked for Palmer's help in securing representative status for the Union at the plant. Palmer said that he and other union officials would be tied up for a few weeks, but that he would turn the matter over to the proper people at the International's convention.

Following his conversation with Palmer, Dunsworth spoke to about 17 employees, asking their opinion of the Aluminum Workers International and whether, if it came to a vote, they would vote for the Union. Greg Doran, a brother of Stuart's sister-in-law, was among the employees contacted by Dunsworth during the first week of July. Doran told Dunsworth that Doran was Stuart's brother-in-law and that Doran did not want to get into trouble because of the Union. Doran indicated that he was not opposed to a union, but that he did not want to help bring it into the plant. Doran testified without contradiction that Dunsworth said that he wanted a union because he knew his job was on the line.

Doran spoke to three or four other employees and asked them whether Dunsworth had talked to them about the Union.

During June and July Dunsworth worked under the supervision of leadman Jerry Campbell. Campbell observed that Dunsworth violated company rules by shutting his machine down because he was thirsty and for cleanup purposes. Campbell also noted that Dunsworth was not paying proper attention to his machine, poking his hopper for longer periods of time than necessary. Campbell did not recall complaining specifically about Dunsworth, a friend of Campbell's. However, Clark testified that Campbell told Clark on July 10 or 11 that Campbell could not get Dunsworth to work. Clark told Campbell to evaluate all the employees on his shift. Campbell's evaluation of Dunsworth, dated July 11, gave Dunsworth an essentially poor job performance rating. Campbell added the following comment:

> Is very slow. Doesn't watch machine. Will shut machine off to get refreshment or clean up. Will argue with supervisors if told to change tem. for one reason or another. Sight may be problem but is slow to react and can't see very well. Request that he be put in mixing or packaging.

Sometime between 3 and 4 p.m. on July 12 Clark and Stuart discussed Dunsworth's past performance and reached the decision to discharge him. Stuart called Dunsworth into the office at or about 4 p.m. and asked Dunsworth if he had seen all of his evaluations and whether the comments on the bottom of the evaluations were correct. Dunsworth admitted seeing his evaluations, but said that he had shut the machine down to poke the hopper so that the material would feed properly and that he had also shut the machine down to clean up the scrap for the next shift. Dunsworth said that he was doing his job and asked to be transferred back to mixing. Stuart said that there were no openings at the time. Stuart told Dunsworth that the Company could not permit an employee to arbitrarily shut his machine down and argue with the shift foreman about what he was supposed to do. Stuart suggested that Dunsworth give the Company 2 weeks' notice and look for another job. Dunsworth refused the offer. Stuart then suggested that the best the Company could do was to allow Dunsworth to finish out the week. However, Clark, who was present, interposed that if Dunsworth was to be discharged he should leave the plant immediately. At that point Dunsworth was discharged.

In addition to Dunsworth, Campbell evaluated 11 other employees on his shift for the month of June. Although the performance ratings of these employees ranged from moderately poor to good, none was as poor as that of Dunsworth and no employee other than Dunsworth received adverse comments on the evaluation form.

Respondent is strongly opposed to the unionization of its employees.

Dunsworth's charge included the following statement: "I think Greg Doran was the one who told them I was talking to everyone about a union." Upon receipt of Dunsworth's charge, Stuart asked Doran about his opinion of Dunsworth's job performance and if there was union activity going on.

At the hearing the General Counsel amended the complaint to allege that Respondent violated Section 8(a)(1) of the Act by the above interrogation of Doran.

[3] Dunsworth denied having a conversation with Clark as to this evaluation. I credit Clark on this point.

III. ANALYSIS AND FINAL CONCLUSIONS OF LAW

I conclude that Respondent did not violate Section 8(a)(1) and (3) of the Act by discharging Michael Allen Dunsworth on July 12.

I have considered the evidence adduced by the General Counsel that Dunsworth was discharged, at least in part, because of his union activity. Thus, the timing of his discharge, within days after he had called Palmer, the alacrity with which it was accomplished, the absence of any written warning, and Respondent's strongly held antiunion views all point to a decision by Respondent to rid itself of a determined union activist.

Nevertheless, the General Counsel has failed to prove an essential element of his *prima facie* case; i.e., that Respondent had knowledge on or before July 12 that Dunsworth or, indeed, any of its employees was engaged in union and protected concerted activity.

Contrary to the General Counsel, the fact that Doran referred to himself as Stuart's "brother-in-law" and asked other employees their views about the Union is not sufficient in and of itself to warrant the inference that Doran informed Stuart of Dunsworth's union activity. While urging that this inference be drawn, the General Counsel argues at the same time that Stuart unlawfully interrogated Doran following receipt of Dunsworth's charge in August. The General Counsel cannot have his cake and eat it too. If Stuart knew in July that Dunsworth and other employees were engaged in union activity, why would Stuart find it necessary to question Doran on this subject in August?

Nor, in my opinion, is the inference warranted that Respondent learned of Dunsworth's union activity by application of the small-plant doctrine. Respondent employs 50 employees, including packaging employees, in 3 shifts, a group not so small and intimate that knowledge may be inferred on that basis alone. The fact of the matter is that Dunsworth was not a good employee. In April he was evaluated essentially as fair with adverse comments. In June he had improved. In July his evaluation dropped to poor and he was discharged. Apparently, Dunsworth was quite aware of his tenuous status and this was a reason, if not the most important one, that he enlisted the aid of a union. In these circumstances the evidence of unlawful motivation, though raising a suspicion of an unlawful discharge, does no more than that. Suspicion is not a substitute for a preponderance of the evidence, which is the General Counsel's burden. I cannot infer on the record evidence that Respondent somehow learned of Dunsworth's union activity and discharged him for that reason.

I find further that Respondent did not violate Section 8(a)(1) of the Act by Stuart's interrogation of Doran following Respondent's receipt of Dunsworth's charge. This isolated instance of interrogation, admitted by Stuart, was not coercive in and of itself or in the context of coercive conduct. It was an isolated act prompted by the notation on Dunsworth's charge that Doran may have informed Respondent of Dunsworth's union activity. Despite Respondent's opposition to unions and its campaign against a union prior to a scheduled Board election in 1978, there is no history of unfair labor practices against this Respondent. Noncoercive interrogation under noncoercive circumstances is not unlawful. *Flint Provision Co.*, 219 NLRB 523 (1975).

Johnnie's Poultry Co. and John Bishop Poultry Co., Successor, 146 NLRB 770 (1964), upon which the General Counsel relies, is inapposite. In that case and its progeny the Board considered standards applicable to the questioning of employees by attorneys in preparation for trial. Stuart's casual, noncoercive questioning of Doran does not fall into that category.

[Recommended Order for dismissal omitted from publication.]